UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION THREE

FUSED SOLUTIONS, LLC

and **Case 03-CA-098461**

UNITED FOOD AND COMMERCIAL WORKERS, DISTRICT UNION LOCAL ONE

OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Fused Solutions, LLC (Respondent), by its undersigned attorneys, for its Opposition to the Motion for Summary Judgment previously filed by the Acting General Counsel of the National Labor Relations Board, states as follows:

BACKGROUND

1. In June 2012, United Food and Commercial Workers, District Union Local One ("UFCW" or "Union") began an organizing campaign in advance of a July 26, 2012 certification of representation election for Respondent's Level 1, 2, and 3 customer service support technicians.

2. One week before the scheduled election, a paid union organizer went to the home of Sherman Taylor – a Level 1 technician and an eligible voter – and informed Mr. Taylor that not voting was the equivalent of voting "no." Hearing Transcript ("Trans.") at 44.

3. At approximately 2:45 PM on the day of the election – with polls open between 7-9 AM and 4-8 PM – Mr. Taylor told his supervisor, Matthew Maroun, that he did not need to vote. Mr. Maroun asked him why he did not think he needed to

vote, and Mr. Taylor explained that the union organizer had told him this during the visit to his home the prior week. Trans. 66—67.

4. At about that same time, Christina Hooper – another Level 1 technician and eligible voter – approached Mr. Maroun and told him that she also was under the impression that not voting would be counted by the National Labor Relations Board as a "no" vote. Trans. 65. Ms. Hooper told Mr. Maroun that several other technicians were under the same impression. Trans. 65.

5. Mr. Maroun relayed these discussions to his supervisor, Pete Blackmer, CTO/COO for Respondent. Trans. 101. Mr. Blackmer then sent an email to all technicians informing them that if they wanted their votes to count, they would have to vote, but by then it was already 2:48 PM, long after the morning voting had closed and with very little notice to employees prior to the afternoon voting. Mr. Blackmer's email is attached as Exhibit "A."

6. There were approximately 44 eligible voters. Ten of those individuals did not vote. Of the remaining 34 eligible voters, 6 ballots were challenged, 9 votes were counted against the UFCW, and 19 votes were counted in favor of the UFCW. The challenged ballots were not reviewed because they were not determinative. See Tally of Ballots, attached as Exhibit "B." Thus, the outcome of the election was decided by the votes of less than 50% of the eligible voters.

7. On August 1, 2012, Respondent filed objections to the conduct affecting the results of the election. Exhibit "C."

8. On September 12, 2012, the Hearing Officer recommended that Respondent's objections be overruled. Exhibit "D."

9. On September 25, 2012, Respondent filed exceptions to the Hearing Officer's recommendations. Exhibit "E."

10. On January 11, 2013, the National Labor Relations Board purported to certify the Union pursuant to the disputed election. Exhibit "F."

11. On January 15, 2013, the Union sent a letter to Respondent requesting information including: employees' names, rates of pay, job classifications, dates of hire, dates of birth, and employment status; total hours worked per employee over the last 12-month period; overtime hours worked over the last 12-month period; a copy of all current company personnel policies, practices, or procedures, including any statements or descriptions regarding such personnel policies, practices, or procedures; a copy of all company fringe benefit plans, including pension, profit sharing, severance, stock incentive, vacation, health and welfare, 401k Plan, legal services, child care, or any other plans which relate to the employees; copies of all current job descriptions; copies of any company wage or salary plans; employees' health care choices; cost per month per employee to the employee who selects health insurance; and cost per month per employee to the employer to provide health insurance. The Union's January 15, 2013 letter is attached as Exhibit "G."

12. On January 30, 2013, the Union sent two additional letters to Respondent, requesting that Respondent provide the information requested in the January 15, 2013 letter no later than February 11, 2013, and that Respondent send a list of all current employees along with their home addresses, phone numbers, and work schedules for the following two weeks. The Union also provided Respondent with dates

to begin scheduling negotiations. The Union's January 30, 2013 letters are attached as Exhibit "H."

13. On February 15, 2013, Respondent sent a letter to the Union stating that Respondent did not believe that the Board's certification of the Union was proper, and that Respondent accordingly declined the Union's request to negotiate and to supply information. Respondent's February 15, 2013 letter is attached as Exhibit "I."

14. On February 15, 2013, the Union filed a charge alleging that Respondent failed to recognize and bargain with the Union, and furnish the Union with requested information. Exhibit "J."

15. The Acting General Counsel of the Board issued a Complaint and Notice of Hearing on February 22, 2013. Exhibit "K."

16. Respondent filed an Answer to the Complaint on March 14, 2013, Exhibit "L", wherein Respondent denied that it violated the National Labor Relations Act in any of the manners alleged in the Complaint or in any other manner. Respondent further stated that the Board has lacked a quorum since August 27, 2011 and therefore had no power or authority to overrule Respondent's objection to the election conducted on July 26, 2012; to certify the election or a bargaining unit representative on January 11, 2013; or to act in any capacity until it obtains a quorum of properly appointed members. Respondent further denied the propriety of the July 26, 2012 election. Respondent further stated that it did not violate Section 8(a)(1) of the Act because it did not interfere with, restrain, or coerce employees in the exercise of any right protected by the Act, and that it did not violate Section 8(a)(5) of the Act because it did not refuse to bargain collectively with any properly certified representative of its employees.

Respondent further stated that the remedy requested by the Regional Director was improper because Respondent did not violate Section 8(a)(1) or Section 8(a)(5) of the Act, and because the remedy requested was impermissibly punitive and would cause an undue hardship on Respondent and its employees. Respondent further stated that the Complaint was *ultra vires* because the Regional Director did not lawfully hold the office of Regional Director of Region 3 at the time she directed that the Complaint be filed, and that she continues to not lawfully hold the office. Respondent further stated that the Complaint was *ultra vires* because the Acting General Counsel of the Board did not lawfully hold the office of Acting General Counsel at the time he directed that the Complaint be filed, and that he continues to not lawfully hold the office.

17. On May 6, 2013, the Board issued a Decision and Order in this proceeding. Thereafter, Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit.

18. Following remand from the District of Columbia Circuit after the Supreme Court's *Noel Canning* decision, on November 26, 2014 the Board issued a Decision and Order again certifying the bargaining unit, and giving Respondent until January 12, 2015 to provide cause as to why the General Counsel's Motion for Summary Judgment should not be granted.

ARGUMENT

THE DECISION TO OVERRULE THE OBJECTIONS AND CERTIFY THE ELECTION WAS MADE IN ERROR AND WAS NOT SUPPORTED BY THE RECORD

As set forth in Respondent's Objection to Conduct Affecting the Results of the Election, the Union was not properly certified because, in part, the Union's actions destroyed the "laboratory conditions" required for a fair election, and it is probable that

the Union's actions disenfranchised a number of voters. Specifically, paid Union organizers interfered with the election by misrepresenting to employees who were not in favor of the Union that abstention from voting would be counted as a "no" vote. Trans. 44. Sherman Taylor (a bargaining unit employee) testified to this behavior by the paid Union organizers, and two other bargaining unit employees – Christina Hooper and Cynthia Bowen – testified that they heard on election day from a number of other employees that they understood that failing to vote was the equivalent of a "no" vote. Trans. 65—67, 90—91. Supervisor Matt Maroun corroborated this testimony when he testified that Mr. Sherman and Ms. Hooper both approached him on election day and asked him whether a failure to vote was equivalent to a "no" vote. Trans. 99, 100.

In holding to the contrary, the Hearing Officer's September 12, 2012 decision was arbitrary and capricious, and not supported by the record. While the Hearing Officer found the testimony of Mr. Taylor not credible, Mr. Taylor's testimony was explicitly corroborated by Ms. Hooper. Ms. Hooper testified that, after the election, *she heard Mr. Taylor speaking to Mr. Maroun about whether or not failure to vote would be counted as a "no" vote.* Tr. at 66—67. For the Hearing Officer to discredit Mr. Taylor's testimony despite this direct corroboration was clear error. Simply put, the Hearing Officer gave no credit to the testimony of *four* witnesses that the Union had violated laboratory conditions by informing employees that not voting was akin to a "no" vote, leaving that clear impression with employees and requiring Respondent to attempt, at the last minute, to correct this egregious violation by the Union. Likewise and for the same reasons, the Board's decision purporting to adopt the Hearing Officer's findings and recommendations and overrule Respondent's exceptions was in error. Notably, the

Board did not explain its basis for overruling Respondent's exceptions *at all*, but simply stated that "it has reviewed the record in light of the exceptions," and that it "adopted the hearing officer's findings and recommendations." This unsupported decision, which deferred to the Hearing Officer's erroneous recommendations, was also therefore arbitrary and capricious, and an abuse of the Board's discretion.

CONCLUSION

As set forth above, Respondent has not violated the National Labor Relations Act in any of the manners alleged in the Complaint or in any other manner. Respondent therefore requests that the Board deny the General Counsel's motion for summary judgment.

Dated: January 12, 2015

Respectfully submitted,

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AFFIDAVIT OF SERVICE

I hereby certify that on January 12, 2014, I electronically filed Respondent's Opposition to Motion for Summary Judgment with the National Labor Relations Board using the NLRB E-Filing system, and served a signed PDF by e-mail to the following:

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Dated: January 12, 2014

Respectfully submitted,

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